No. (1)

SUPREME COURT, U.S.
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In The Supreme Court of the United States

TAYLOR AYES, WILLIAM P. CUTSHALL, FRANK A. RIBAR, EDWARD C. SMITH, JAMES F. MARTIN, and WILLIAM C. TERRIO,

Petitioners,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTION PRESENTED

Section 525(a) of the United States Bankruptcy Code prohibits certain discriminatory conduct by governmental units against individuals or entities that have been debtors under Title 11 of the United States Code or that have not paid a debt that was discharged under Title 11. Section 3702(b)(1)(B) of VA Home Loan Guaranty Program, 38 U.S.C. § 3701 *et seq.* allows Respondent to deny full reinstatement of the Home Loan Guaranty to a Veteran if the Respondent has suffered a loss on the guaranteed loan, including cases in which the loss was suffered as a result of the discharge of a debt under Title 11. The Question Presented is:

Whether the anti-discrimination provisions contained in 11 U.S.C. § 525(a) are applicable to the VA Home Loan Guaranty Program, 38 U.S.C. § 3701 *et seq.*, and specifically § 3702(b)(1)(B) of Title 38 of the United States Code?

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No.

In The
Supreme Court of the United States

TAYLOR AYES, WILLIAM P. CUTSHALL, FRANK A. RIBAR, EDWARD C. SMITH, JAMES F. MARTIN, and WILLIAM C. TERRIO,

Petitioners,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioners, Taylor Ayes, William P. Cutshall, Frank A. Ribar, Edward C. Smith, James F. Martin, and William C. Terrio respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The opinion of the court of appeals is reported at 473 F.3d 104 and is reproduced in the Appendix (App.) at 1. The order of the court of appeals denying rehearing en banc is reproduced at App. 17.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 2006. A petition for rehearing en banc was denied on February 23, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 525(a) provides:

> Except as provided in the Perishable Agricultural Commodities Act, 1930, the Packers and Stockyards Act, 1921, and section 1 of the Act entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes," approved July 12, 1943, a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to . . . discriminate with respect to such a grant against . . . a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act . . . solely because such bankrupt or debtor is or has been a debtor under this title . . . or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

38 U.S.C. § 3702(b)(1)(B) provides:

> In computing the aggregate amount of guaranty or insurance housing loan entitlement available to a veteran under this Chapter, the Secretary may exclude the amount of guaranty or insurance housing loan entitlement used for any guaranteed, insured, or direct loan, if . . . the loan has been repaid in full, or the Secretary has been released from liability as to the loan, or if the Secretary has suffered a loss on such loan, the loss has been paid in full.

STATEMENT OF THE CASE

This case involves the one of the most important sections of the United States Bankruptcy Code, the "fresh start" embodied in the discharge granted by Section 727,[1] and the Respondent's interpretation and application of the statutes and regulations governing its home loan guaranty program. At issue is whether Respondent is subject to the anti-discrimination provisions of 11 U.S.C. § 525 when it makes determinations about whether or not to allow Petitioners to fully participate in the loan guaranty entitlement program codified in 38 U.S.C. §§ 3701–3733, following Petitioners discharge of a debt to Respondent, instead of treating the discharged debt as if it never existed.

Section 524 creates a permanent injunction against the collection of any discharged debt. This

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[1] A debtor filing for relief under Chapter 13 of the bankruptcy code receives a discharge pursuant to 11 U.S.C. § 1328 after all plan payments have been completed.

injunction is a "total prohibition on debt collection efforts," and is intended to "insure that once a debt is discharged, the debtor will not be pressured *in any way* to repay it. In effect, the discharge extinguishes the debt . . . ." H.R. 95-595, at 365 (emphasis added). The fresh start requires that the discharged debt be treated as if it never existed. Otherwise, it would be difficult to imagine a fresh start for a bankrupt individual, if the individual remains saddled with the incidents of prior debts." *Henry v. Heyison*, 4 B.R. 437, 440 (Bankr. E.D. Pa. 1980).

Section 525 of the Bankruptcy Code was enacted following this Court's landmark decision in *Perez v. Campbell*, 402 U.S. 637 (1971). In *Perez*, this Court held that an Arizona statute that allowed the state to withhold the issuance of a debtor's driver's license following the discharge of a tort judgment in bankruptcy frustrated the full effectiveness of the "fresh start." Following *Perez*, Congress enacted Section 525 to prohibit discrimination against debtors by preventing governmental units from denying the receipt of certain governmental benefits solely because that debtor failed to repay a debt that was discharged in bankruptcy. 11 U.S.C. § 525(a).

Despite the protection afforded to debtors by Section 525, Respondent has discriminated against Petitioners by conditioning their full participation in the home loan guaranty program upon the repayment of a discharged debt. Congress enacted the home loan guaranty program, codified in 38 U.S.C. § 3701 *et seq.*, following World War II, as part of the Serviceman's Readjustment Act of 1944. This Act was an effort to place Veterans on an even playing field with non-Veterans. One of the key provisions of this act provides a guaranty for eligible Veterans purchasing a residence whereby the Respondent guaranties a portion of a Veteran's loan with

a third party lender.[2] Should a Veteran default on his home mortgage, the Respondent has a claim against the Veteran for the amount paid by the Respondent to the lender on the guaranty. The amount paid by the Respondent to the lender is commonly referred to as a "loss" in the relevant guaranty statutes. A Veteran may have a previously used home loan entitlement restored subject to certain conditions. However, following a loss, the only way a Veteran's loan guaranty may be restored is if "the loss has been paid in full." 38 U.S.C. § 3702(b)(1)(B). This requirement that a loss be fully repaid before a guaranty is fully reinstated is discretionary, as "[t]he Secretary *may*, in any case involving circumstances deemed appropriate, waive . . . the requirement" that the loss be paid in full before reinstatement of the full loan guaranty entitlement. 38 C.F.R. § 36.4302(k) (emphasis added).

Petitioners are all Veterans who are qualified under the home loan guaranty program, and had participated in the program in the past. Petitioners each caused Respondent to incur a loss when it paid on the guaranty to the private lending institution. Petitioners then discharged their obligations to Respondent in their respective bankruptcy cases. When Petitioners later sought to have their full guaranty restored, they were denied the full restoration of their entitlement by the Respondent to the extent of the loss to Respondent, despite the discretion given to Respondent to fully restore a Veteran's full home loan guaranty entitlement, and despite the provisions of Section 525.

Petitioners filed this action, alleging that Respondent's denial of their full loan guaranty to the

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[2] The Respondent does not make loans directly to Veterans under this statute; instead, the Respondent agrees to pay a statutorily determined amount to a third party lender should the Veteran default on its home mortgage.

extent of the loss caused to Respondent violated Section 525 of the Bankruptcy Code. Following an Order by the United States District Court for the Eastern District of North Carolina which granted Respondent's motion to dismiss the Petitioners' Complaint,[3] the Petitioners appealed to the United States Court of Appeals for the Fourth Circuit.

On December 27, 2006, the court of appeals issued an opinion affirming the district court's ruling. While the court of appeals found that Respondent's home loan guaranty program constituted a grant, it held that this grant was not similar to the other grants set forth in Section 525(a) because it was not related to the pursuit of employment or economic betterment and was also available from the private sector. *Ayes v. U.S. Dept. of Veterans Affairs*, 473 F.3d 104, 108-09 (4th Cir. 2006). Finally, the court of appeals found that the "fresh start" policy contained within the Bankruptcy Code could not be used to construe Section 525(a)'s statutory language more broadly than the limitation placed on the protected grants by the inclusion of the word "similar" in the statute. *Id.* at 111. Petitioners petition for Rehearing En Banc was denied on February 23, 2007.

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[3] Petitioners filed a cross motion for partial summary judgment, alleging that Respondent had violated Section 525; however, because the district court determined that Section 525 did not apply to Respondent, it denied Petitioners' motion without deciding whether Petitioners would have succeeded on the remaining elements of their claim under Section 525. In its appeal to the Fourth Circuit, Petitioners contended that the district court's decision should have been reversed and Petitioners' motion for summary judgment should have been granted. Like the district court, the court of appeals did not reach the issue of the remaining elements of Petitioners' claim under Section 525, finding that Section 525 did not apply to Respondent in this instance.

REASONS FOR GRANTING CERTIORARI

The Fourth Circuit held in this case that the home loan guaranty entitlement was not similar to those governmental benefits or programs specifically set forth in Section 525(a). This holding is erroneous and improperly limits the reach of Section 525(a) and the fresh start policy underlying the entire purpose of the Bankruptcy Code. Respondent's discriminatory treatment of Veterans like Petitioners undermines the fresh start, both by rendering the discharge ineffective, as Veterans are required to repay discharged debts to participate in the program, and by impacting the ability to obtain affordable housing which is critical to a debtor's ability to emerge from bankruptcy and receive the benefits of the fresh start.

Moreover, the ruling conflicts with this Court's holding in *Federal Communications Commissions v. NextWave Personal Communications, Inc.*, 537 U.S. 293 (2003) which requires a broad interpretation of Section 525. The court of appeals decision also conflicts with the decision of the Second Circuit in *In re Stoltz*, 315 F.3d 80 (2d Cir. 2002), which found that a public housing lease was a protected grant that could not be revoked solely because a debtor failed to repay a discharged debt. The Second Circuit also cast doubt as to the continued viability and applicability of *Goldrich v. New York State Higher Education Services Group*, 771 F.2d 28 (2d Cir. 1985) an earlier opinion from the second circuit upon which the Fourth Circuit relied in denying Petitioners' appeal.

This erroneous interpretation of Section 525(a) impacts a substantial number of debtors and Veterans by significantly limiting the scope of Section 525(a), creating the potential for the very discriminatory conduct

Congress drafted Section 525 to prohibit. Review by this Court is necessary in order to determine the proper scope of Section 525.

I. THE DECISION OF THE FOURTH CIRCUIT IMPROPERLY LIMITS THE FRESH START THROUGH ITS NARROW INTERPRETATION OF SECTION 525.

The court of appeals' decision improperly exempts Respondent from Section 525, and therefore allows Respondent to condition receipt of a grant on the repayment of a discharged debt, notwithstanding the effect of the discharge. The discharge granted to a bankruptcy debtor discharges a debtor from all of his debts that arose before the date of the petition, without regard to whether the creditor filed a proof of claim pursuant to 11 U.S.C. § 501 or whether or not such claim is allowed under 11 U.S.C. § 502. *See* 11 U.S.C. § 727(b). This discharge is "the heart of the fresh start provisions of the bankruptcy law." H. REP. NO. 95-595, at 384 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963 (hereinafter "H.R. 95-595"). The discharge is considered the "cornerstone of the fresh start policy." *Schultz v. Shapiro*, 59 B.R. 844, 847 (Bankr. E.D.N.Y. 1986); *In re Bogdanovich*, 292 F.3d 104, 107 (2d Cir. 2002) ("Congress made it a central purpose of the bankruptcy code to give debtors a fresh start in life and a clear field for future effort unburdened by the existence of old debts."); *see generally* Reginald A. Greene, *Supreme Court Invalidates FCC License Revocation*, 2 BUSINESS RESTRUCTURING REVIEW 2 (2003) ("The 'fresh start' principle is based on the notion that a debtor should emerge from bankruptcy with a clean slate.").

This Court has found that the purpose of the fresh start is to:

> 'relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.' This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.

Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934). Discharged debts are to be treated as if they never existed: "Once a debt has been discharged under the Code a state may not treat a debtor differently than a person who never incurred a debt." *Henry v. Heyison*, 4 B.R. 437, 442 (E.D. Penn. 1980). Otherwise, it would be "difficult to imagine a fresh start for a bankrupt individual, if the individual remains saddled with the incidents of prior debts." *Id.* at 442.

In 2003, this Court addressed the fresh start in the context of Section 525 for the first time in *Federal Communications Commission v. Nextwave Personal Communications Inc.*, 537 U.S. 293 (2003). In *Nextwave*, this Court gave a broad interpretation to Section 525, finding, among other things, that the government's

motive was irrelevant when determining whether a governmental unit discriminated against a debtor solely because of a discharged debt. *Id.* at 302-303. Although *Nextwave* dealt with discrimination in the context of licenses, this Court's analysis of section 525 shows that a broad reading of the statute is required in order not to render the section superfluous. *See id.* at 302.[4] In both the holding and the underlying reasoning, this Court upheld the sanctity of § 525(a) and thereby the fresh start:

> The whole issue before us can be described as asking what the Bankruptcy Code's promise of a "fresh start" consists of. Rather than reframing the question, our interpretation concretely accords a "fresh start" where the dissent would not -- where there is revocation of a license solely because of a bankrupt's failure to pay dischargeable debts.
>
> . . . .
>
> We think Congress meant what it said: The Government is not to revoke a bankruptcy debtor's license solely because of a failure to pay his debts.

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[4] 11 U.S.C. § 525(a) specifically excepts the Perishable Agricultural Commodities, Act, 1930, the Packers and Stockyards Act, 1921, and section 1 of the Act entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1994, and for other purposes, approved July 12, 1943." The Court in *NextWave* noted that these specific exceptions set forth in Section 525 would be "entirely superfluous" if the Court accepted the FCC's motive exception, "which means, of course, that such a reading must be rejected." *Nextwave*, 537 U.S. at 302.

Id. at 305-06 & n. 4. *Nextwave* supports granting a broad interpretation of Section 525 in order to protect the fresh start, and shows that the Fourth Circuit's decision to interpret Section 525 narrowly is incorrect and must be reversed.

Not only has this Court indicated a broader reading of Section 525 is appropriate, Congress intended that courts broadly interpret Section 525 to protect against discrimination:

> [This] section is not exhaustive. The enumeration of various forms of discrimination against former bankrupts is not intended to permit other forms of discrimination....The Courts will continue to mark the contours of the anti-discrimination provisions of the Bankruptcy Code in pursuit of sound bankruptcy policy.

H.R. Rep. 95-595, at 366-367 (1997) *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6323 (hereinafter H.R. Rep. 95-595); *In re Jasper*, 325 B.R. 50, 54 ("It is universally recognized that the statutory enumeration of various proscribed forms of discrimination is not exhaustive."). This Court should grant Petitioners' request for certiorari in order to ensure that Section 525 is interpreted in the manner intended by Congress.

II. THE DECISION OF THE FOURTH CIRCUIT CONFLICTS WITH A PRIOR DECISION OF THE SECOND CIRCUIT.

The court of appeals decision that Respondent's loan guaranty program was not similar to the programs and benefits included in Section 525 is in error and

conflicts with the decision of the Second Circuit in *In re Stoltz*, 315 F.3d 80 (2nd Cir. 2002). *Stoltz*, one of the few cases to examine what constitutes a protected grant, focused on the unavailability of the grant from the private sector and whether or not the grant was critical to the fresh start. *Stoltz*, 315 F.2d at 90. The Fourth Circuit, however, found that a protected grant bore no relation to the fresh start, allowed the individual to "pursue some occupation or endeavor aimed at economic betterment." In its analysis, the Fourth Circuit relied heavily on *In re Goldrich*, 771 F.2d 28, 30 (2d Cir.1985), which is of doubtful validity following the *Stoltz* decision. Because of its reliance on this case, the Fourth Circuit incorrectly limited the scope of Section 525 to economic or employment matters, instead of those matters critical to the fresh start, as found in *Stoltz*. Review by this Court is necessary in order to ensure that grants critical to the fresh start are protected by Section 525.

In *Stoltz*, the Second Circuit concluded that all of the enumerated items in section 525, as well as those items found to be similar to the enumerated programs or benefits, share the common characteristic of being property interests that are (1) unattainable from the private sector, and (2) essential to a debtor's fresh start. *Id.*, at 90. Here, the entitlement provided by the Respondent shares these common characteristics. Just as a debtor-tenant's current public housing lease is her "single most significant material possession," *see Stoltz; In Re Whitsett*, 163 B.R. 752, 755 (Bankr. E.D.Pa. 1994), a Veteran's access to housing is likewise essential. There is no greater essential to the "fresh start" than accessible housing. Minimizing the Petitioners' guaranty effectively limits their access to affordable housing. While it is true that the Petitioners might be able to obtain a *loan* from another lender on less favorable terms, the "similar grant" at issue here is not the loan, but the *guaranty* of a loan by Respondent. The loan guaranty entitlement is

something that is only available from the government, as this type of benefit is not provided by the private sector because it is a financial incentive given to qualified Veterans who have met the service requirements. Moreover, as previously noted, just as a debtor-tenant's public housing lease is her "single most significant material possession," *see id.*, so the veteran's access to housing is likewise essential to realizing his or her "fresh start."

The conclusion that the loan guaranty entitlement fits squarely within Section 525(a)'s "other similar grant" language is buttressed by Section 525(a)'s specific exceptions. *See NextWave*, 537 U.S. at 302 ("[W]here Congress has intended to provide regulatory exceptions to provisions of the Bankruptcy Code, it has done so clearly and expressly . . . ."). Congress specifically exempted three agricultural related programs from Section 525. *See* 11 U.S.C. § 525(a). In addition, Congress has created an exception for certain federal financial aid programs.

For example, in *In re Betty Owen Schools Inc.*, 195 B.R. 23 (Bankr. S.D.N.Y. 1996), the court found that the Department of Education did not violate Section 525 when it decertified a debtor/school from participating in federal aid programs. The court found that while the Department of Education appeared to violate Section 525 on its face, Congress had limited the fresh start for schools which filed bankruptcy by modifying section 362(b) to exclude determinations of eligibility to participate in the federal program from the automatic stay and by defining property of the estate to exclude eligibility to participate in federal financial aid programs.

Had Congress wanted to exempt the VA Home Loan Guaranty Program it could have created an exception for it in Section 525, or somehow limited the fresh start for veterans by modifying other sections of the

Code. Absent an express exception or limitation on the fresh start, Section 525 should apply to prevent the Respondent's discriminatory conduct in light of Congress' directive that Section 525 be construed broadly. *See* H.R. 95-595, at 336.

The Fourth Circuit's holding that the loan guaranty program does not qualify as a similar grant because it is not a program of economic betterment is erroneous and ignores the very purpose of Respondent's program. The specific purpose of the loan guaranty program was to compensate for the effect of serving in the armed forces on a Veterans' ability to obtain credit by guaranteeing private loans made by third parties, which was determined to be beneficial to a Veteran's economic wellbeing:

> Since the inception of the program, the congressional objective has been to assist eligible veterans to become homeowners. Veterans are assisted by making it possible for them to compete in the market place for credit with persons who were not obliged to forego the pursuit of gainful occupations by reason of service in the Armed Forces of the nation. The VA programs are intended to benefit men and women because of their service to the country . . .
>
> . . . .
>
> Credit was viewed as one of the cornerstones of a program to aid the veteran in his/her effort to readjust to civilian life. In the opinion of the supporters of the original legislation, the

> Government should provide the means whereby the veteran could obtain favorable credit which would permit him/her to shelter his/her family or begin a business[5] or farming venture. This concept arose because of the feeling that veterans, in view of their service in the Armed Forces had missed an opportunity to establish a credit rating which could be the basis of borrowing to acquire a home or to establish a business. The establishment of the loan guaranty program was an attempt to place the veteran on a par with his/her nonveteran counterpart.

Legislative History of the VA Home Loan Guaranty Program (updated 1/1/00), *at* http://www.homeloans.va.gov/docs/HISTORY.doc. The legislative history clearly shows that while other individuals may be able to obtain credit, and thereby obtain housing on favorable terms, a Veteran's time spent serving his county may adversely affect his ability to purchase a home because of his diminished credit standing, an impact significant to this particular group of debtors, making the guaranty critical to the fresh start. Congress meant the home loan guaranty to act as an economic betterment program by providing Petitioners and other Veterans with the means to improve their financial position by becoming homeowners, using the guaranty to compensate for their lack of credit history.

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[5] The current legislation does not provide for business related lending to veterans.

The decision of the Fourth Circuit also conflicts with the Second Circuit's prior ruling in *Stoltz* by its reliance on *In Re Goldrich*, 771 F.2d 28 (2d Cir. 1985), upon which the Second Circuit case doubt as to its continuing validity in *Stoltz*. Congress specifically overruled *Goldrich* when Congress amended section 525 in 1994 to include subsection (c). Congress specifically stated that "this section overrules *In re Goldrich*, 771 F.2d 28 (2nd Cir. 1985), which gave an ***unduly narrow*** interpretation to Code section 525." H.R. Rep. No. 103-835, at 58 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 3340, 3367 (emphasis added). Congress also made it clear that section 525(c) was not limited to student loan cases: "Like section 525 itself, this section is not meant to limit ***in any way*** other situations in which discrimination should be prohibited." *Id.* at 3367 (emphasis added); *see also Collier on Bankruptcy* § 525.02[5] (15th ed. rev. 2005) ("Thus, not only decisions permitting discrimination with respect to student loans, but also decisions permitting discrimination in other loan-related benefit programs, must be questioned anew in light of this clear statement of congressional intent.").

The Second Circuit itself expressly recognized that Congress disapproved of its conclusion in *Goldrich* that credit transactions, in general, were not subject to section 525. *See In re Stoltz*, 315 F.3d 80, 86 & n. 2. (2nd Cir. 2002) ("Section 525(c) signaled congressional disapproval of *Goldrich* in which this Court had narrowly construed section 525(a)'s 'other similar grant' language to not include extensions of credit.") (citations omitted). In addition, not all cases examining section 525(a) have agreed with *Goldrich*. *See, e.g., Rose v. Connecticut Hous. Fin. Auth.*, 23 B.R. 662, 667 (Bankr. D.Conn. 1982) ("Congress intended to prevent discriminatory treatment in the field of mortgage financing.").

Furthermore, since the validity of excluding an extension of credit from section 525 remains in question, cases such as *Watts* and *Toth v. Michigan State Housing Development Authority*, 136 F.3d 477 (6th Cir. 1998), have also been called into doubt. These cases never adequately examined the state programs at issue to determine if they were "more in the nature of benefits conferred upon needy applicants, without regard to their credit worthiness, and therefore more similar to a franchise or similar grant, than an extension of credit." *Collier*, § 525.02[5]. Based on this, it is clear that the District Court's reliance on *Goldrich* and its progeny is misplaced, and section 525(a) must be read to prohibit discrimination in loan guaranty programs. This Court should review the decision of the Fourth Circuit in order to resolve the conflict between the Fourth Circuit and the Second Circuit as to whether or not the fresh start plays any role in determining whether a grant is subject to Section 525.

III. THIS CASE PRESENTS A QUESTION OF SIGNIFICANT NATIONAL IMPORTANCE.

Finally, this Court should review the decision of the Fourth Circuit because of its significant impact on both Veterans like Petitioners as well as debtors who have received discharges under the Bankruptcy Code. The most significant effect of the court of appeals' decision is to significantly narrow the "fresh start" by permitting Respondent to circumvent the discharge injunction by requiring that Petitioners either forgo the full effect of the discharge, or repay a debt discharged during their bankruptcy cases. Allowing this practice to continue renders the discharge useless to a significant number of Veterans. In addition, the narrow interpretation of Section 525 opens the door to other governmental units to engage in similar discriminatory conduct and coerce debtors into repaying discharged

debts or being prohibited from receiving grants that other non-debtors receive.

Because the court of appeals' decision addresses the significant question of the scope of the fresh start, and ultimately whether Respondent will be able to continue to force a significant number of Veterans to choose between giving up their fresh start or choosing to participate in the loan guaranty entitlement program, this decision should be reviewed by this Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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May 24, 2007.

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[ENTERED: DECEMBER 27, 2006]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-2263

TAYLOR AYES; WILLIAM P. CUTSHALL; FRANK A. RIBAR; EDWARD C. SMITH; JAMES F. MARTIN; WILLIAM C. TERRIO,
Plaintiffs-Appellants,

v.

U. S. DEPARTMENT OF VETERANS AFFAIRS,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of North Carolina,
at Raleigh.
W. Earl Britt, Senior District Judge.
(CA-04-904-5)

Argued: October 26, 2006

Decided: December 27, 2006

Before WILKINSON, NIEMEYER, and WILLIAMS,
Circuit Judges.

Affirmed by published opinion. Judge Williams wrote the opinion, in which Judge Wilkinson and Judge Niemeyer joined.

COUNSEL

ARGUED: Trawick Hamilton Stubbs, Jr., STUBBS & PERDUE, P.A., Raleigh, North Carolina, for Appellants. Neal Irving Fowler, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee. **ON BRIEF:** Laurie B. Biggs, STUBBS & PERDUE, P.A., Raleigh, North Carolina, for Appellants. Frank D. Whitney, United States Attorney, Anne M. Hayes, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

OPINION

WILLIAMS, Circuit Judge:

Taylor Ayes, William P. Cutshall, Frank A. Ribar, Edward C. Smith, James F. Martin, and William C. Terrio (collectively "Appellants") filed a class action complaint against the U.S. Department of Veterans Affairs (VA) on behalf of themselves and a putative class of veterans. The complaint alleged that the VA violated 11 U.S.C.A. § 525 (West 2004 & Supp. 2006), the anti-discrimination provision of the Bankruptcy Code, by refusing to fully restore veteran home-loan guaranty entitlements to Appellants solely because of their previous discharges in bankruptcy. The district court granted the VA's motion to dismiss, made pursuant to

Federal Rule of Civil Procedure 12(b)(6), because it concluded that § 525(a) does not apply to the veteran guaranty entitlement, which is set out at 38 U.S.C.A. § 3701 *et seq.* (West 2002 & Supp. 2006).

We affirm. Section 525(a) prohibits a governmental unit from denying a "license, permit, charter, franchise, or other similar grant" solely because an individual has filed for or received a discharge in bankruptcy. 11 U.S.C.A. § 525(a). Because Appellants concede that the veteran guaranty entitlement is not a "license," "permit," "charter," or "franchise" and we hold that it is not an "other similar grant," we conclude that § 525(a) does not apply to the veteran guaranty entitlement.

I.

Because the facts of this appeal are undisputed, we are left only to decide the legal question of § 525(a)'s applicability to the veteran guaranty entitlement. Pursuant to the Servicemen's Readjustment Act of 1944, codified at 38 U.S.C.A. § 3701 *et seq.*, the VA provides housing assistance to certain veterans meeting length-of-service requirements by guarantying home loans made to them by private lenders. The VA "automatically guarantee[s]" loans for certain veterans when the loans will be used for, among other things, the purchase or construction of a home. 38 U.S.C.A. § 3710(a). Pursuant to 38 U.S.C.A. § 3703, the VA computes the guaranty amount as a percentage of the unpaid loan balance, with the percentage varying depending on the size of

the original loan.[1] 38 U.S.C.A. § 3703(a)(1)(A). If the veteran later defaults on the loan, the VA pays the private lender the amount it guaranteed on behalf of the veteran. 38 U.S.C.A. § 3732(a)(1). In such cases, the VA becomes subrogated to the rights of the private lender for the amount paid by the VA on the guaranty. *Id.* While the regulations relating to the veteran guaranty program state that any amount paid by the VA in satisfaction of a guaranty made on behalf of a veteran "shall constitute a debt owing to the United States by such veteran," 38 C.F.R. § 36.4323(e) (2006), the VA acknowledges that it does not take any action to collect this debt.

There is no limit to the number of times a veteran may receive the guaranty entitlement, but the amount of guaranty available to the veteran is always limited by any previously used guaranty amount that has not been restored to the VA or does not otherwise qualify for exclusion. 38 U.S.C.A. § 3702(b). Specifically, § 3702(b) provides the following:

> In computing the aggregate amount of guaranty or insurance housing loan entitlement available to a veteran under this chapter, the Secretary may exclude the amount of guaranty or insurance housing loan entitlement used for any guaranteed, insured,

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[1] For example, the basic entitlement for any loan of more than $56,520 is the lesser of $36,000 or forty percent of the loan. 38 U.S.C.A. § 3703(a)(1)(A)(i)(III)(West 2002 & Supp. 2006).

> or direct loan under the following circumstances:
>
> > (1) (A) The property which secured the loan has been disposed of by the veteran or has been destroyed by fire or other natural hazard; and
> >
> > (B) the loan has been repaid in full, or the Secretary has been released from liability as to the loan, or if the Secretary has suffered a loss on such loan, the loss has been paid in full.

38 U.S.C.A. § 3702(b)(1)(A)-(B).

In other words, the amount of guaranty available to a veteran upon a successive application for the benefit is reduced by the amount of loss that the VA suffered on any previous guaranty made on behalf of the veteran until that loss is repaid.[2] Absent an exercise of the VA's discretion to waive the repayment requirements, if a veteran wishes to receive the "full" guaranty amount after the VA

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[2] The VA does retain some discretion in computing the aggregate amount of guaranty available to a veteran who has previously used the guaranty entitlement. Section 3702(b) states that the VA Secretary "may exclude" previously used amounts of guaranty when the requirements in either § 3702(b)(1)(A) or (b)(1)(B) are met. 38 U.S.C.A. § 3702(b). The regulations implementing the statute provide that the VA Secretary, "in any case involving circumstances deemed appropriate, may waive" the requirements in § 3702(b)(1)(A) or (b)(1)(B). 38 C.F.R. § 36.4302 (2006). Obviously, the VA chose not to exercise its discretion to waive these requirements in Appellants' cases.

previously suffered a loss on a guaranty made on his or her behalf, the veteran has no choice but to repay the loss in full.

Appellants are six veterans who allege that they sought home loans from various private lenders after having received discharges in bankruptcy under either Chapter 7 or Chapter 11 of the Bankruptcy Code and were denied these loans because the VA refused to extend "full" guaranties on their behalf. The VA refused to extend full guaranty amounts to Appellants because it had suffered losses on previous loan guaranties made on their behalf that had not been repaid. Appellants contend that as a result of the VA's decision not to fully reinstate loan guaranties to them following their discharges in bankruptcy, they were severely limited in their ability to obtain private home loans. We have jurisdiction over this appeal pursuant to 28 U.S.C.A. § 1291 (West 2006).

II.

We review de novo the district court's grant of the VA's motion to dismiss made pursuant to Federal Rule of Civil Procedure 12(b)(6). *Bominflot, Inc. v. The M/V Henrich S*, 465 F.3d 144, 145 (4th Cir. 2006). "[A] Rule 12(b)(6) motion should only be granted if, after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999).

Section 525(a) of the Bankruptcy Code provides in pertinent part that "a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to . . . [or] discriminate with respect to such a grant against . . . a person that is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act . . . ." 11 U.S.C.A. § 525(a). The statute codified the result of *Perez v. Campbell*, 402 U.S. 637 (1971), in which the Supreme Court applied the Supremacy Clause to strike down an Arizona financial responsibility law that conditioned reinstatement of a debtor's driver's license on repayment of an accidentrelated judgment that had been discharged in bankruptcy. *Id.* at 656. The Court held that the Arizona law violated the policy underlying the Bankruptcy Code, sometimes called the "fresh start" policy, that debtors be given a "new opportunity in life . . . unhampered by the pressure and discouragement of pre-existing debt" because it gave creditors a "powerful weapon with which to force bankrupts to pay their debts despite their discharge." *Id.* at 648, 654 (internal quotation marks omitted).

To establish a violation of § 525(a), Appellants must show that (1) the VA is a governmental unit, (2) the veteran guaranty entitlement is an item covered by the statute, and (3) the VA discriminated against Appellants solely because of their discharges in bankruptcy. 11 U.S.C.A. § 525(a). The VA concedes that it is a "governmental unit" under the statute, but argues that Appellants cannot show that the veteran guaranty entitlement is an item covered by § 525(a) or that the VA discriminated against

Appellants solely because of their prior discharges in bankruptcy.

Conceding that the veteran guaranty entitlement is not a "license," "permit," "charter," or "franchise," Appellants argue that the veteran guaranty entitlement comes within § 525's protections because it is an "other similar grant." The veteran guaranty entitlement is undoubtedly a "grant" as that term is used in the statute: a veteran satisfying the length-of-service requirements is entitled to the loan guaranty benefit. *See Black's Law Dictionary* 719 (8th ed. 2004) (defining grant as "an agreement that creates a right of any description other than the one held by the grantor"). The question is whether it is a "similar" grant to those specific items listed in § 525(a).

In interpreting a statute, "a court should always turn first to one, cardinal canon [of construction] before all others": the plain meaning rule. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992). We must presume that "Congress says in a statute what it means and means in a statute what it says. . . ." *Hartford Underwriters Ins. Co. v. Union Planters Blank, N.A.*, 530 U.S. 1, 6 (2000)(internal quotation marks omitted). When the words of a statute are unambiguous, then, "this first canon is also the last: 'judicial inquiry is complete.'" *Conn. Nat'l Bank*, 503 U.S. at 254 (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). Of course, in looking to the plain meaning, we must consider the context in which the statutory words are used because "[w]e do not . . . construe statutory phrases

in isolation; we read statutes as a whole." *United States v. Morton*, 467 U.S. 822, 828 (1984).

Section 525(a)'s meaning is plain. The statute clearly specifies that its protections extend to "licenses, permits, charters, [and] franchises," and to grants "similar" to those items.[3] 11 U.S.C.A. § 525(a). Although the term "grant" is not defined in the statute, the use of the word "similar" limits the universe of "grants" to which § 525(a) applies, ensuring that only grants bearing a family resemblance to licenses, permits, charters, and franchises enjoy the antidiscrimination protections of the Bankruptcy Code. Unfortunately for Appellants, the veteran guaranty entitlement bears no such resemblance to the items listed in § 525(a). Licenses, permits, charters, and franchises are all governmental authorizations that typically permit an individual to pursue some occupation or endeavor aimed at economic betterment. *See Watts v. Pa. Hous. Fin. Co.*, 876 F.2d 1090, 1093 (3d Cir.

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[3] We note that our mode of analysis would not change even if the word "similar" were omitted from the statute. When "general words follow specific words in a statutory enumeration," we apply the interpretive principle of *ejusdem generis* ("of the same kind") and construe "the general words . . . to embrace only objects *similar* in nature to those objects enumerated by the preceding specific words." *Wash. State Dep't of Soc. and Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003)(emphasis added)(internal quotation marks omitted). Omitting the word "similar," Section 525(a) would present a "textbook *ejusdem generis* scenario." *Andrews v. United States*, 441 F.3d 220, 224 (4th Cir. 2006). It would contain a general phrase — "other grant" — that followed a list of specific items — "license, permit, charter, franchise." 11 U.S.C.A. § 525(a).

1989)("[T]he items enumerated [in § 525(a)] are in the nature of indicia of authority from a governmental unit to the authorized person to pursue some endeavor."). For example, governmental entities issue real-estate, driver's, and medical licenses; building and business permits; corporate charters; and utility franchises. All of these implicate "government's role as a gatekeeper in determining who may pursue certain livelihoods," *Toth v. Mich. State Hous. Dev. Auth.*, 136 F.3d 477, 480 (6th Cir. 1998), and show that Congress intended § 525(a)'s protections to be "limited to situations sufficiently similar to *Perez*," *In re Goldrich*, 771 F.2d 28, 30 (2d Cir. 1985). This interpretation of "other similar grant" is supported by the remainder of § 525(a), which forbids governmental discrimination in *employment* decisions based on an individual's discharge in bankruptcy. *See* 11 U.S.C.A. § 525(a).

A home loan guaranty, on the other hand, does not implicate the government's gate-keeping role in determining who may pursue certain livelihoods because, unlike the enumerated items in § 525(a), a person can obtain a home loan or guaranty from the private sector. A governmental entity's refusal to issue, for example, a commercial real estate license to a bankrupt individual completely forecloses that individual from legally pursuing a career as a commercial realtor. If a governmental entity refuses to guarantee a home loan for a bankrupt individual, however, that individual is not doomed to homelessness; he may seek a guaranty from family or friends, may seek another private loan, perhaps on less favorable

terms, or he may rent.[4] Indeed, Appellants concede that they "might be able to obtain a home loan from another lender on less favorable terms." (Appellant's Br. at 18.) That governmental units do not exercise exclusive or even pervasive control over the "world" of home loans dooms Appellants' argument.

The Second Circuit's decision in *Goldrich*, which has served as the lodestar in the § 525(a) context, is the closest analogue to the instant case.

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[4] Appellants rely on the Second Circuit's decision in *In re Stoltz*, 315 F.3d 80 (2d Cir. 2002), in support of their contention that the veteran guaranty entitlement is similar to the enumerated items in § 525(a). In *Stoltz*, the Second Circuit held that a public housing lease is an "other similar grant" under § 525(a). *Id.* at 90-91. Reasoning that the enumerated items in § 525(a) are "property interests [that] are unobtainable from the private sector and essential to a debtor's fresh start," the *Stoltz* court noted that a public housing lease is "by definition . . . obtainable only from governmental entities" and that "[i]n light of the notoriously lengthy waiting lists that may exist for public housing, . . . an evicted debtor-tenant . . . would quite possibly become homeless - a status not conducive to economic survival." *Id.* at 90. Even if we agreed with *Stoltz*, the public housing lease at issue in that case is manifestly different than the home loan guaranty here. First, unlike a public housing lease, home loans and loan guaranties are not "by definition" only obtainable from governmental entities. Second, as we have noted, failure to obtain a home loan guaranty is not a step toward homelessness for the veterandebtor; the veteran may obtain a home loan on less favorable terms or may choose alternative housing arrangements that do not involve ownership. Third, unlike the public housing benefit in *Stoltz*, the veteran guaranty entitlement is not available only to those who, through bankruptcy or other financial hardship, cannot obtain a home loan. If Oliver Stone, the presumably wealthy Oscar-winning film director and veteran of the Vietnam War, applied for the guaranty benefit, he would be entitled to receive it just like the recently-bankrupted veteran would.

Goldrich held that § 525(a) was inapplicable to New York's student loan guaranty program because a student loan guaranty was not a "similar grant" to the items listed in the statute. *Goldrich*, 771 F.2d at 30-31. The *Goldrich* court reasoned that a "credit guarantee is not a license, permit, charter, or franchise[,] nor is it in any way similar to those grants," and stated that "[a]lthough the exact scope of the items enumerated [in § 525(a)] may be undefined, the fact that the list is composed solely of benefits conferred by the state that are unrelated to credit[5] is unambiguous." *Id.* at 30 (footnote added). "[R]eluctant to probe beyond the plain language of [§ 525(a)]," the court concluded that the student loan guaranty at issue was of a "distinctly different character" than the items listed in the statute. *Id.*

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[5] While we emphasize that the central question under § 525(a) is whether the home loan guaranty is an "other similar grant" to the items listed in the statute and not whether the guaranty is more like an extension of credit, we agree with the district court that "the extension of a home loan guaranty has financial consequences for the guarantor that are not dissimilar to consequences often faced by those who extend credit." (J.A. at 132.) Moreover, and contrary to Appellants' contention, a veteran's creditworthiness is relevant, at least minimally, to the overall decision to extend the guaranty benefit; a veteran is only automatically eligible for a guaranty when a private lender concludes that the veteran meets the standards of creditworthiness — including debt-to-income ratio, income-stability, and monthly-income requirements — established *by the VA*. *See* 38 U.S.C.A. §§ 3701(g)(2), (3) (West 2002). These facts reveal the similarities between the veteran guaranty entitlement and traditional extensions of credit and clearly show the *dissimilarities* between the guaranty entitlement and the items listed in § 525(a).

Appellants acknowledge that *Goldrich*'s rationale is plainly at odds with their position on appeal, but they argue that Congress's enactment in 1994 of 11 U.S.C.A. § 525(c) rendered *Goldrich* a dead letter and clearly evinced Congress's intent to have § 525(a) apply to all government loan guaranties. To be sure, § 525(c) clearly abrogated *Goldrich*'s specific holding and extended the anti-discrimination protections of § 525(c) to student loan guaranties. *See* 11 U.S.C.A. § 525(c)("A governmental unit that operates a *student grant or loan program* . . . may not deny a grant, loan, *loan guarantee*, or loan insurance to a person that is or has been a debtor under this title or . . . under the Bankruptcy Act. . . ." (emphasis added)). There is, however, no indication in the language of § 525(c) that Congress also intended the section to apply to other kinds of loan guaranties besides those of the student loan variety. Congress's tightly-worded abrogation of *Goldrich*'s specific holding "justif[ies] the inference that items not mentioned" — in this case, other kinds of loan guaranties — "were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003). Had Congress intended to extend § 525's protections to other government loan guaranties besides student loans, it easily could have revised § 525(a) to prevent a governmental unity from denying a "license, permit, franchise, charter, *loan guaranty*, or other similar grant" on the basis of a previous discharge in bankruptcy or, alternatively, it could have included some term in § 525(c) that would have supported extension of § 525(a)'s protections to all government loan guaranties, not just those of the student loan variety. That Congress chose instead to

narrowly amend § 525 to abrogate the specific holding of *Goldrich* is strong evidence that its failure to mention other kinds of loan guaranties in § 525(c) was intentional.[6] The time-honored maxim *expressio unius est exclusio alterius* ("the expression of one thing implies the exclusion of another") applies with great force here.

In reaching this conclusion, we, like our sister circuits, refuse to venture beyond the confines of the statutory language to broadly construe § 525(a)'s specific "other similar grant" language in reliance on the general "fresh start" policy underlying the Bankruptcy Code. *See, e.g.*, *Watts*, 876 F.2d at 1093-94 (holding that an emergency mortgage-assistance loan is not an "other similar grant" and stating that "[w]hen an unambiguous statute is interpreted to mean what it says, the interpretation is not narrow"); *Toth*, 136 F.3d at 479-80 (holding that a government home improvement loan is not an "other similar grant" under § 525(a)); *Goldrich*, 771 F.2d at

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[6] Appellants argue that exclusion of the veteran loan guaranty program from the protections of § 525(a) makes little sense in light of Congress's extension of § 525(a)'s coverage to student loan guaranties, but Congress could easily have concluded that the differences between student and home loan guaranties require such a distinction. Because education is often crucial to securing employment, § 525(c)'s prohibition against discrimination in the granting of student loan guaranties to bankrupts is consistent with § 525's goal of allowing former debtors in bankruptcy to earn a living. *See* 11 U.S.C.A. § 525(c). Moreover, Congress has taken other steps to ensure the continuing wide availability of student loans, highlighting their uniqueness under the Bankruptcy Code. *See, e.g.*, 11 U.S.C.A. 523(a)(8) (West 2004 & Supp. 2006)(making student loans nondischargeable under the Bankruptcy Code except in cases of "undue hardship").

30 (concluding that Congress intended § 525(a)'s reach to be "limited to situations sufficiently similar to *Perez*".). Assuming, as we must, that "Congress says in a statute what it means and means in a statute what it says there," *Hartford Underwriters*, 530 U.S. at 6 (internal quotation marks omitted), we conclude that Congress's limitation of § 525(a)'s protections to licenses, permits, charters, franchises, and grants similar to those items indicates, at best, the full extent to which Congress intended § 525(a) to effectuate the "fresh start" policy underlying the Bankruptcy Code.[7] As *Watts* noted, because § 525(a) is unambiguous, our interpretation is not "narrow," but instead succinctly correct. *Watts*, 876 F.2d at 1093-94.

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[7] Indeed, on its face, § 525(a) applies to items — such as the recreational hunting and fishing licenses noted above — that can in no way be described as "essential" to a debtor's fresh start, which counsels against courts extending § 525(a) beyond its plain language to effectuate the overarching policy of the Bankruptcy Code. *See Stoltz*, 315 F.3d at 95 (Walker, C.J., dissenting)("Although some interests such as a vendor license, may be essential to a bankrupt's fresh start, others, such as a recreational fishing license, are not."). On the other hand, the inclusion of these items within the definitions of the enumerated items in § 525(a) also does not force a reading of the statute that brings other items unrelated to the goals of § 525(a) within the statute's protections. That the plain language of § 525(a) extends § 525(a)'s protections to items unrelated to § 525(a)'s policies is not an invitation to courts to extend § 525(a)'s protections to items *not covered* by the plain language. In any event, even recreational hunting and fishing licenses are only available from governmental entities.

III.

In sum, because we conclude that the veteran guaranty entitlement is not an "other similar grant" within the meaning of § 525(a), we hold that the anti-discrimination protections of § 525 do not apply to the veteran home loan guaranty program. While we have sympathy for Appellants, if their arguments carried the day and the VA was always required to issue a "full" guaranty irrespective of whether it has suffered a loss on a veteran's behalf, the VA's financial exposure under the program would increase dramatically, potentially threatening the program's long-term viability. This is no mere pipedream, as the incentive for veterans to repay home loans guaranteed by the VA would disappear if veterans could demand full guaranties even after the VA had suffered an unrecouped loss on a guaranty made on their behalf. Requests for full guaranties would likely multiply like party guests, with the VA ultimately "flipping the bill" on defaulted loans at a greater clip. Appellants assume that the VA has deep pockets; we assume that those pockets only function well when they do not have holes in them. Jettisoning the plain language of § 525(a) to extend its coverage over the VA's guaranty program would create such holes. Nevertheless, if Congress wishes to extend § 525's protections to other kinds of loan guaranties besides student loan guaranties, it can easily do so with a few strokes of the pen.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[ENTERED: FEBRUARY 23, 2007]

FILED
February 23, 2007

No. 05-2263
CA-04-904-5

TAYLOR AYES; WILLIAM P. CUTSHALL; FRANK A. RIBAR; EDWARD C. SMITH; JAMES F. MARTIN; WILLIAM C. TERRIO

Plaintiffs - Appellants

v.

U. S. DEPARTMENT OF VETERANS AFFAIRS

Defendant - Appellee

On Petition for Rehearing En Banc

The appellants' petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

Entered for a panel composed of Judge Wilkinson, Judge Niemeyer, and Judge Williams.

For the Court,

/s/ Patricia S. Connor
CLERK

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(3)

No. 06-1594

In the Supreme Court of the United States

TAYLOR AYES, ET AL., PETITIONERS

v.

DEPARTMENT OF VETERANS AFFAIRS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether 11 U.S.C. 525(a), which prohibits the government from denying an individual a "license, permit, charter, franchise, or other similar grant" solely because the individual has filed for or received a discharge in bankruptcy, covers the denial of a veteran home loan guaranty.

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In the Supreme Court of the United States

No. 06-1594

TAYLOR AYES, ET AL., PETITIONERS

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DEPARTMENT OF VETERANS AFFAIRS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 473 F.3d 104. The opinion of the district court (Pet. Supp. App. 1-18) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 2006. A petition for rehearing was denied on February 23, 2007 (Pet. App. 17-18). The petition for a writ of certiorari was filed on May 24, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Servicemen's Readjustment Act of 1944 (Act), as now codified at 38 U.S.C. 3701 *et seq.*, the United States Department of Veterans Affairs (VA) guarantees loans made by private lenders to qualifying

veterans for buying or building homes. 38 U.S.C. 3710(a). If a veteran defaults on a guaranteed loan, the VA pays the private lender the guaranteed amount. 38 U.S.C. 3732(a)(1). With regard to the guaranteed loans at issue in this case, if the VA has made a payment on a defaulted loan, the veteran becomes indebted to the United States in the amount paid by the VA. See *ibid.*; 38 C.F.R. 36.4323.

The Act places no limit on the number of times that a veteran may receive a loan guaranty but grants each veteran only a finite loan guaranty entitlement. The amount of the guaranty available to each veteran is therefore generally reduced by the amount of any loss that the VA suffered on a previous guaranty on behalf of the veteran, until that loss is repaid. Pet. App. 4-5. A veteran generally must repay the loss in order to receive his full guaranty entitlement. 38 U.S.C. 3702(b)(1)(A) and (B); 38 C.F.R. 36.4302(i).

b. Under Section 525(a) of the Bankruptcy Code, "a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, * * * [or] discriminate with respect to, such a grant against * * * a person that is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, * * * solely because such bankrupt or debtor * * * has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act." 11 U.S.C. 525(a).

2. Petitioners are six veterans who received loan guaranties from the VA and defaulted on their loans, leaving the VA to make the associated guaranty claim payments. Petitioners later received discharges in bankruptcy under either Chapter 7 or Chapter 11 of the

Bankruptcy Code with respect to their obligations to repay the VA for its losses on the loan guaranties. After petitioners received discharges in bankruptcy, they applied for additional loan guaranties from the VA. The VA denied petitioners the maximum loan guaranties because they had not repaid the losses that the VA had suffered as a result of their previous defaults. Subsequently, private lending institutions denied petitioners' loan applications. Pet. App. 6.

3. Petitioners sued the VA in the United States District Court for the Eastern District of North Carolina, alleging violations of their rights under 11 U.S.C. 525(a) and 38 U.S.C. 3701 *et seq.* Pet. Supp. App. 1. Petitioners claimed that the VA's refusal to provide full guaranties of their loans after the discharge of their debts in bankruptcy violated 11 U.S.C. 525(a). Pet. Supp. App. 3. The district court granted the VA's motion to dismiss petitioners' complaint. *Id.* at 1-18. The court concluded that the VA had not violated Section 525(a) because a VA home loan guaranty is not "a license, permit, charter, franchise, or other similar grant." *Id.* at 4; see *id.* at 4-18.

4. The court of appeals affirmed. Pet. App. 1-16. In the court of appeals, petitioners conceded that a home loan guaranty is not a license, permit, charter, or franchise, but they argued that it is nonetheless covered by Section 525(a) because it is a "similar grant." *Id.* at 8. The court of appeals rejected that argument because a home loan guaranty bears no resemblance to the other items listed in Section 525(a). *Ibid.* The court explained that, unlike licenses, permits, charters, and franchises, a home loan guaranty is not a governmental authorization, solely under government control, that grants permission for an individual to pursue an endeavor aimed at

his economic improvement. *Id.* at 9. The court noted that the items expressly covered by Section 525(a) all implicate the "government's role as a gatekeeper in determining who may pursue" certain economic activities. *Id.* at 10 (quoting *Toth* v. *Michigan State Hous. Dev. Auth.*, 136 F.3d 477, 480 (6th Cir.), cert. denied, 524 U.S. 954 (1998)). "A home loan guaranty," in contrast, "does not implicate the government's gate-keeping role" because "a person can obtain a home loan or guaranty from the private sector." *Ibid.*

The court of appeals rejected petitioners' reliance on *In re Stoltz*, 315 F.3d 80 (2d Cir. 2002), which held that a public housing lease is a "similar grant" under Section 525(a). Pet. App. 11 n.4. The court explained that its holding that a VA home loan guaranty is not a "similar grant" is fully consistent with *Stoltz*, which concluded that Section 525(a) covers "property interests [that] are unobtainable from the private sector and essential to a debtor's fresh start" after bankruptcy. *Ibid.* (quoting *Stoltz*, 315 F.3d at 90). The court noted that, unlike a public housing lease, a home loan guaranty may be obtained from sources other than the government. And, although a public housing lease may be essential to "economic survival" because loss of the lease could lead to homelessness, a home loan guaranty is not similarly essential. *Ibid.* (quoting *Stoltz*, 315 F.3d at 90). A veteran who is unable to obtain a VA loan guaranty may obtain a home loan on less favorable terms or may choose an alternative housing arrangement that does not involve ownership. Moreover, VA home loan guaranties are not limited to the economically disadvantaged but are available regardless of need. *Ibid.*

The court of appeals concluded that *In re Goldrich*, 771 F.2d 28 (2d Cir. 1985), is the closest analogue to this

case. Pet. App. 11. The court explained that *Goldrich* held that Section 525(a) was inapplicable to New York's student loan guaranty program because a loan guaranty is not a "similar grant." *Id.* at 12. The court acknowledged that Congress abrogated the specific holding in *Goldrich* by enacting 11 U.S.C. 525(c), which extends the anti-discrimination protections of 11 U.S.C. 525 to student loans and guaranties. Pet. App. 13. But the court noted that Congress had carefully limited the scope of Section 525(c) to student loans and had not revised Section 525(a). *Ibid.* The court therefore concluded that Section 525(c) supported rather than undermined *Goldrich*'s conclusion that Section 525(a) does not cover credit guarantees. *Id.* at 13-14 (noting that the "time honored maxim *expressio unius est exclusio alterius* * * * applies with great force here").

The court of appeals also observed that other circuits had reached similar conclusions about the meaning of the phrase "other similar grant." Pet. App. 14-15 (citing, *e.g.*, *Toth*, 136 F.3d at 479-480 (holding that a government home improvement loan is not an "other similar grant"), and *Watts* v. *Pennsylvania Hous. Fin. Co.*, 876 F.2d 1090, 1093-1094 (3d Cir. 1989) (holding that a state emergency mortgage assistance loan is not an "other similar grant")). The court therefore "refuse[d] to venture beyond the confines of the statutory language," *id.* at 14, noting that, "if Congress wishes to extend § 525's protections to other kinds of loan guaranties besides student loan guaranties, it can easily do so with a few strokes of the pen," *id.* at 16.

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or an-

other court of appeals. This Court's review is therefore not warranted.

1. The court of appeals correctly concluded that Section 525(a) does not extend to VA home loan guaranties. Section 525(a) covers only the denial of "a license, permit, charter, franchise, or other similar grant." 11 U.S.C. 525(a). As the court of appeals explained, although a home loan guaranty may be a "grant," the statute covers only those grants "bearing a family resemblance to licenses, permits, charters, and franchises." Pet. App. 9. That limitation flows from the statute's express terms, which restrict covered grants to those "similar" to the listed items. 11 U.S.C. 525(a). And that limitation accords with ordinary principles of statutory construction. Under the principle of *ejusdem generis*, when "general words follow specific words in a statutory enumeration, * * * the general words" are construed "to embrace only objects *similar* in nature to those objects enumerated by the preceding specific words." Pet. App. 9 n.3 (quoting *Washington Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003)).

As the court of appeals correctly observed (Pet. App. 9-11), a home loan guaranty does not resemble the items specifically enumerated in Section 525(a). Licenses, permits, charters, and franchises all implicate the "government's role as a gatekeeper" in granting or denying "permission to pursue certain occupations or endeavors." *Toth* v. *Michigan State Hous. Dev. Auth.*, 136 F.3d 477, 480 (6th Cir.), cert. denied, 524 U.S. 954 (1998); see *Watts* v. *Pennsylvania Hous. Fin. Co.*, 876 F.2d 1090, 1093 (3d Cir. 1989). "A home loan guaranty, on the other hand, does not implicate the government's gate-keeping role." Pet. App. 10. A loan guaranty does

not authorize an individual to engage in an activity; rather, it is an economic subsidy. In addition, loan guaranties are available from a variety of sources other than the government. *Ibid.* A person can obtain a loan guaranty from family, friends, or private financial institutions. Thus, "[a] credit guarantee is not" a "similar grant" covered by Section 525(a). *In re Goldrich*, 771 F.2d 28, 30 (2d Cir. 1985); accord *Toth*, 136 F.3d at 480 ("The items enumerated in the statute * * * are benefits conferred by the government that are unrelated to the extension of credit.").

Every court of appeals that has addressed the issue has concluded, like the court of appeals here, that Section 525(a) does not cover loans or loan guaranties. For example, in *Watts*, the Third Circuit concluded that a loan under a state program designed to forestall mortgage foreclosure was not a "similar grant" within Section 525(a) because it was not "authority from a governmental unit to the authorized person to pursue some endeavor." 876 F.2d at 1093. For similar reasons, the Sixth Circuit held in *Toth* that a low-income home improvement loan was not a "similar grant." See 136 F.3d at 478-479, 480. And the Fourth Circuit, in a previous unpublished opinion, concluded that a rural housing loan from the Farmers Home Administration was not covered by Section 525(a) because "the determination of whether to extend credit is not an application for a 'license, permit, charter, franchise, or other similar grant.'" *Bryant* v. *United States*, No. 96-1161, 1997 WL 633256, at *1 (Oct. 14, 1997) (125 F.3d 847 (Table)); accord *Goldrich*, 771 F.2d at 30.

2. Petitioners incorrectly contend (Pet. 7, 8-11) that the decision of the court of appeals conflicts with *FCC* v. *NextWave Personal Communications, Inc.*, 537 U.S. 293

(2003), which they assert requires "a broad interpretation of Section 525(a) in order to protect the fresh start" principle. Pet. 11.

The decision below does not conflict with *NextWave*. In *NextWave*, this Court held that Section 525(a) prohibits the Federal Communications Commission from revoking communications licenses held by a debtor in bankruptcy upon the debtor's failure to make timely payments owed to the Commission with respect to the licenses. 537 U.S. at 295, 301. No one disputed that the communications licenses at issue in *NextWave* were "licenses" within the meaning of Section 525(a). *Id.* at 301. Accordingly, this Court had no occasion to interpret the phrase "other similar grant," much less to decide whether loans or loan guaranties are encompassed by that phrase.

Contrary to petitioners' assertions (Pet. 7, 11), moreover, the Court in *NextWave* did not endorse a "broad interpretation" of Section 525(a) in order to advance the principle that debtors who receive a discharge in bankruptcy are entitled to a fresh start unburdened by their prior debts. Instead, the Court focused on the statutory language. The Court refused to read into that language an exemption for license denials based on a valid regulatory purpose because, when Congress intended exemptions to the statute's coverage, it provided them expressly. See 537 U.S. at 301. The Court criticized the dissent for invoking the purposes of the statute in disregard of the text. See *id.* at 304-305. And the Court rejected the dissent's reliance on the fresh start policy in particular. See *id.* at 305 n.4. The Court explained that reliance on the fresh start policy is "circular" because the "whole issue" of interpreting Section 525(a) "can be described as asking what the Bankruptcy Code's prom-

ise of 'fresh start' consists of." *Ibid.* Thus, to the extent *NextWave* is relevant at all, it supports rather than undermines the court of appeals' reliance on the plain language of Section 525(a) to conclude that the statute does not cover home loan guaranties.

3. Petitioners also err in contending (Pet. 11-17) that the decision of the court of appeals conflicts with *In re Stoltz*, 315 F.3d 80 (2d Cir. 2002). The question in *Stoltz* was whether a public housing lease is a "similar grant," not whether a loan guaranty meets that description. Moreover, contrary to petitioners' contentions (Pet. 12), the reasoning in *Stoltz* is fully consistent with the conclusion of the court below that a VA home loan guaranty is not a "similar grant." In *Stoltz*, the Second Circuit reasoned that Section 525(a) covers "property interests [that are] unobtainable from the private sector and essential to a debtor's fresh start." 315 F.3d at 90. As the court below noted in distinguishing *Stoltz*, a home loan guaranty, unlike a public housing lease, meets neither of those criteria. See Pet. App. 11 n.4. Loan guaranties are available from a variety of sources other than the government—family, friends, and private financial institutions. See *ibid.* Nor are loan guaranties essential to a fresh start. The court in *Stoltz* concluded that a public housing lease may be essential to "economic survival" because loss of the lease could lead to homelessness. 315 F.3d at 90. But, as the court below explained, a home loan guaranty is not similarly essential: a veteran who is unable to obtain a loan guaranty may obtain a home loan on less favorable terms or may choose an alternative housing arrangement that does not involve ownership. Pet. App. 11 n.4.

Petitioners argue (Pet. 12-13) that loan guaranties *from the VA* are available only from the government,

just as public housing leases are. Pet. 12. The relevant comparison, however, is not to guaranties offered exclusively by the VA, but to loan guaranties generally. Petitioners also point out (Pet. 14-15) that the purpose of the VA loan guaranty program is to promote the economic betterment of veterans. That may be true, but it does not mean that VA loan guaranties are "essential to a debtor's fresh start." *Stoltz*, 315 F.3d at 90. A loan guaranty likely improves a veteran's economic lot, but it is not *essential* for a fresh start, because an individual denied a loan guaranty still has a diverse array of housing options, including buying a home with less desirable loan arrangements or renting.

Petitioners also incorrectly argue (Pet. 16-17) that the decision below conflicts with *Stoltz* because the court below relied on the Second Circuit's earlier decision in *Goldrich*, and statements in *Stoltz* cast doubt on the continued validity of that decision. This Court, however, "reviews judgments not statements in opinions." *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956). In any event, contrary to petitioner's argument, *Stoltz* did not disavow the reasoning in *Goldrich*. *Stoltz* merely noted that Congress, by enacting Section 525(c), had abrogated *Goldrich*'s holding that Section 525 does not cover student loans. See *Stoltz*, 315 F.3d at 86 n.2. The court of appeals here acknowledged that Section 525(c) abrogated the specific holding of *Goldrich*, but the court pointed out that nothing in Section 525(c) calls into question *Goldrich*'s more general conclusion that Section 525(a) does not cover credit guarantees. Pet. App. 13. Indeed, as the court of appeals noted, in responding to *Goldrich*, Congress did not revise Section 525(a) but instead added Section 525(c), which covers only *student* loans and guaranties. That course of action reinforces,

rather than undermines, the conclusion that Section 525(a) does not cover loans and guaranties. See *ibid.*

4. Finally, petitioners mistakenly contend (Pet. 17-18) that this Court's review is warranted because the court of appeals' interpretation of Section 525(a) is harmful to veterans. Contrary to petitioners' argument, concern for veterans' financial welfare may counsel against expanding Section 525(a) to cover veteran home loan guaranties. As the court of appeals observed, requiring the VA to grant the maximum possible guaranty to a veteran regardless of whether the VA has suffered a loss because of that veteran's prior default could jeopardize the financial health of the loan guaranty program and threaten its long-term viability. Pet. App. 16. In any event, the decision whether to amend Section 525(a) to protect veterans who defaulted on their loans and sought bankruptcy protection is Congress's to make. As the court of appeals noted, Congress could make that change "with a few strokes of the pen." *Ibid.* There is no reason or authority for this Court to take on that legislative function.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2007

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In The Supreme Court of the United States

TAYLOR AYES, WILLIAM P. CUTSHALL, FRANK A. RIBAR, EDWARD C. SMITH, JAMES F. MARTIN, and WILLIAM C. TERRIO,

Petitioners,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Order of
The Honorable W. Earl Britt
Re: Dismissing Case
entered October 7, 2005 ..... Supp.App. 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

[ENTERED: October 7, 2005]

No. 5:04-CV-904-BR(3)

TAYLOR AYES, WILLIAM P. CUTSHALL, FRANK A RIBAR, EDWARD C. SMITH, JAMES F. MARTIN, and WILLIAM C. TERRIO	)	
Plaintiffs,	)	
v.	)	ORDER
UNITED STATES DEPARTMENT OF VETERANS AFFAIRS,	)	
Defendant.	)	

Defendant's motion to dismiss, or alternatively for summary judgment, and plaintiffs' motion for summary judgment are before the court.

On 30 November 2004, plaintiffs filed a complaint alleging violations of their rights under 11 U.S.C. § 525(a), the anti-discrimination provision of the bankruptcy code, and 38 U.S.C. §§ 3701, *et seq.*, which pertains to a loan guaranty program available to veterans. On 10 March 2005, in lieu of an answer, defendant submitted a motion to dismiss, or, alternatively, for summary judgment, with supporting memorandum. Plaintiffs submitted their own motion for summary judgment along with a memorandum in support of that motion and in response to defendant's motion for summary judgment on 11 April 2005. Defendant filed a

combined response to plaintiffs' motion and reply to plaintiffs' response to its own motion on 13 May 2005. Plaintiffs filed a reply on 9 June 2005, and the motions are ripe for review.

Facts

Plaintiffs are six veterans[1] who, after receiving discharges in bankruptcy under Chapter 7 or 11, were "denied reinstatement of their full loan guaranty entitlement[s] under 38 U.S.C. §§ 3701 *et seq.*" by the United States Department of Veterans Affairs (the VA or defendant).[2] (Compl. ¶ 1.) Specifically, plaintiffs allege that they each attempted to secure financing for the purchase or construction of homes from various private lenders after having obtained discharges in bankruptcy and that they were denied loans. (Compl. ¶¶ 23, 27, 31, 56, 63.) Plaintiffs assert that the various private lending institutions denied their loan applications because the VA refused to provide Certificates of Eligibility reflecting "full" loan guaranty entitlements.[3] The VA refused to extend these veterans

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[1] While plaintiffs purport to bring their suit as a class action on behalf of all similarly situated veterans, plaintiffs have not been certified as a class, and the class certification issue is not before the court at this stage in the proceedings.

[2] Plaintiffs do not provide in their complaint details of their original home loan guaranties from the United States Department of Veterans Affairs (VA). They do not, however, deny that they received such guarantees as permitted by the statute the first time they applied. Plaintiffs also state that their debts were discharged in bankruptcy proceedings. (Compl. ¶¶ 22, 30, 39, 48, 54, 61.) Plaintiffs do not specifically allege that they had obligations to the VA that were discharged in bankruptcy, but they do not deny that the VA sustained losses on their accounts.

[3] The court notes that the VA offered three of the named plaintiffs guaranties reduced by the amount of the loss sustained by the VA on behalf of the veteran at issue. (Compl. ¶¶ 24, 33, 42.)

"full" guaranties because the VA had suffered losses on previous loan guaranties made on behalf of those veterans that had not been paid in full. Plaintiffs assert that the VA's decision not to restore their "full" loan guaranty entitlements following discharge of their debts in bankruptcy constitutes unlawful discrimination in violation of 11 U.S.C. § 525(a).

Standard of Review

For purposes of a motion to dismiss pursuant to Rule 12(b)(6), the court construes the complaint in the light most favorable to the non-moving party and takes as true the allegations therein. As stated by the Supreme Court:

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Conley v. Gibson, 355 U.S. 41, 45-46 (1957). "[T]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claim." Revene v. Charles County Com'rs, 882 F.2d 870, 872 (4th Cir. 1989).

To resolve defendant's motion to dismiss, the court must determine whether section § 525(a) applies to the government loan guaranty program described at 38 U.S.C. §§ 3701 *et seq.* If it does not, defendant prevails. With respect to plaintiffs' motion for summary judgment, defendant contends that there are, in any event, issues of fact pertaining to causation and damages that preclude an award of summary judgment in favor of plaintiffs. (Def.'s Resp. at 12.) Plaintiffs maintain that, regardless of the issues of fact

identified by defendant, an award of partial summary judgment in favor of plaintiffs would be appropriate to the extent that the court agrees with plaintiffs' interpretation of § 525(a) and determines that defendant's denial of the guaranties at issue violated that statute.

Discussion

The parties' primary disagreement centers on the interpretation of 11 U.S.C. § 525(a), which provides, in part, that

> a governmental unit may not deny ... a license, permit, charter, franchise, or other similar grant to ... [or] discriminate with respect to such a grant against ... a person that... has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act ... solely because such bankrupt or debtor ... has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act ... or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act."

11 U.S.C. § 525(a).

Plaintiffs allege that the VA's refusal to guarantee their home loans constituted the denial of an "other similar grant" under § 525(a) and thus discriminatory conduct. Defendant argues that the VA's loan guaranty program for veterans is not an "other similar grant" within the meaning of § 525(a) and that § 525(a) is therefore inapplicable to its loan guaranty program.

A. Home Loan Guaranty Entitlements

Title III of the Servicemen's Readjustment Act of 1944, Pub. L. No. 346 (78th Cong., 2d Sess.), 58 Stat. 291, as amended, codified at 38 U.S.C. §§ 3701-33, authorizes the VA to provide housing assistance to veterans in the form of home loan guaranties when loans are extended by private lenders and, in some circumstances, direct loans. The VA's decision not to guarantee loans available from, private lenders in certain circumstances is at issue in this case.[4]

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[4] Plaintiffs emphasize that eligible veterans receive lending approval from private lending institutions and that the VA does not conduct an Independent credit assessment. Plaintiffs further mainlain ihat if a veteran meets the statutory service requirements he or she is automatically eligible for a loan guaranty. Section 3710(b), however, clearly states that

> No loan may be guaranteed under this section unless–... (2) the contemplated terms of payment required in any mortgage to be given in part payment of the purchase price or (he construction cost bear a proper relation to the veteran's present and anticipated income and expenses; [and] (3) the veteran is a satisfactory credit risk, as determined in accordance with the credit underwriting standards established pursuant to subsection (g) of this section.

Section 3710(g) clearly indicates that, before a loan is extended that will trigger the guaranty provided by this statute, a veteran's creditworthiness is evaluated by the lender pursuant to regulations established by the Secretary. Section 3701(g)(2) provides in full:

> (2) For the purpose of determining whether a veteran meets the standards referred to in subsection (b)(3) of this section and section 3712(e)(2) of this title, the Secretary shall prescribe regulations which establish–
> (A) credit underwriting standards to be used in evaluating loans to be guaranteed under this chapter; and
> (C) standards to be used by lenders in obtaining credit information and processing loans to be guaranteed under this chapter.

Under 38 U.S.C. § 3710, certain loans to veterans made pursuant to the provisions of chapter 37 of Title 38 are "automatically guaranteed" when made for one of several enumerated purposes, including the purchase or construction of a residence to be used as a home. 38 U.S.C. § 3710(a). The amount of a guaranty available to a veteran for a particular loan is computed in accordance with a formula set forth in the statute. 38 U.S.C. § 3703(a)(l). For example, the basic entitlement for any loan of more than $56,250.00 is the lesser of 536,000 or 40% of the loan. 38 U.S.C. § 3703(a)(3)(A)(i)(III). If the VA guarantees a loan for an eligible veteran and the veteran defaults on that loan, the VA is required to reimburse the private lender for any deficiency that arises as a result of the default up to the full amount of the guaranty. Defendant then becomes subrogated to the rights of the private lender to the extent of the amount paid on the guaranty. 38 U.S.C. § 3732(a)(l). Defendant also has an "independent contractual right of indemnity" against the veteran for the amount of the guaranty paid to the lender. See Dixon v. United States, 68 F.3d 1253, 1255 (10th Or. 1995),

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Section 3701(g)(3) further provides that

> In the regulations prescribed under paragraph (2) of this subsection, the Secretary shall establish standards that include--
> (A) debt-to-income ratios to apply in the case of the veteran applying for the loan;
> (B) criteria for evaluating the reliability and stability of the income of the veteran applying for the loan; and
> (C) procedures for ascertaining the monthly income required by the veteran to meet the anticipated loan payment terms.

Accordingly, it would appear that a veteran will be automatically eligible for a guaranty only when a private lender ascertains that the veteran meets the standards of creditworthiness set out by the Secretary. The court thus rejects plaintiffs' argument that veterans' eligibility is based solely on military service and the related argument that there is a meaningful distinction between governmental units that provide funds or guaranties based on creditworthiness and those that make such guaranties based solely on a person's status as a veteran. (Pls.' Reply at 4.)

cert. denied, 517 U.S. 1167 (1996). The regulations state that "[a]ny amounts paid by the Secretary on account of the liabilities of any veteran guaranteed or insured under the provisions of 38 U.S.C. chapter 37 shall constitute a debt owing to the United States by such veteran," 38 C.F.R. § 36.4323(e).

The guaranty entitlement may be used on successive occasions, but the amount of guaranty available is statutorily limited by any benefits previously used by the veteran unless the benefit bas been restored, or qualifies for exclusion, under § 3702(b). Section 3702(b), which describes the basic entitlement, includes the following provision:

> (b) In computing the aggregate amount of guaranty or insurance housing loan entitlement available to a veteran under this chapter, the Secretary may exclude the amount of guaranty or insurance housing loan entitlement used for any guaranteed, insured, or direct loan under the following circumstances:
> (1)(A) The property which secured the loan has been disposed of by the veteran or has been destroyed by fire or other natural hazard; and
> (B) the loan has been repaid in full, or the Secretary has been released from liability as to the loan, or if the Secretary has suffered a toss on such loan, the toss has been paid in full....
> The Secretary may, in any case involving circumstances the Secretary deems appropriate, waive one or more of the conditions prescribed in paragraph (1).

In other words, if the VA bas sustained a loss on a previous guaranty and that loss has not been paid in full, the amount of that loss may typically not be excluded in determining the amount of guaranty entitlement available to the veteran upon a subsequent application. See Dixon, 68 F.3d at 1257 (where plaintiff argued that his loan guaranty availability under the Guaranty Program should be fully reinstated because his debt to the VA was discharged in bankruptcy, court cited 38 U.S.C. § 3702(b) for the proposition that "[a] veteran loses his eligibility to have his previously used loan guaranty entitlement restored where the VA has incurred an unreimbursed loss because of that veteran's transactions pursuant to the Guaranty Program."). As plaintiffs note, the statute does give the VA the discretion to "waive one or more of the conditions prescribed in paragraph (1)" in any case involving circumstances the Secretary deems appropriate.[5]

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[5] Plaintiffs also suggest that the words "may exclude" in § 3702(b) suggest that the Secretary "has the discretion to reduce the veteran's entitlement" by the amount of a previous loss unless the loss is repaid in full, (Pls.' Mem. at 7.) However, the phrasing of the statute, that the Secretary "may exclude" previously used amounts if certain conditions have been met, suggests a slightly different interpretation; (the Secretary has the discretion to restore an entitlement not the discretion to reduce an entitlement. In other words, the statutory language suggests an automatic reduction in entitlement based on previous use and that the Secretary may or may not restore a previously used guaranty when the delineated conditions have been met. The use of the words "may exclude" in this provision would not seem to imply the converse, i.e., permission to exclude amounts previously extended where the conditions have not been met. The cited section establishes the baseline – that previously used amounts automatically reduce the available guaranty unless the restorative conditions are met. It is the waiver provision cited by plaintiffs that authorizes a discretionary deviation from that rule.

The implementing regulations cited by plaintiff support this interpretation of the statute.

In this case, the VA took into account its unreimbursed losses when determining the amount of guaranties available to plaintiff veterans, and the statutory language indicates that the VA's decision to do so was explicitly permitted by the guaranty program. The more difficult question is whether the VA's decision violated the anti-discrimination provision of the bankruptcy code.

B. Section 525(a): The Anti-discrimination Provision of the Bankruptcy Code

Debtors who seek relief under 11 U.S.C. § 727 and § 1328 may obtain the discharge or release of all prepetition dischargeable debts under Chapters 7 and 13, respectively. Plaintiffs argue that, under the "fresh start" policy that underlies the bankruptcy code, in particular sections 524 and 525, they are entitled to have their debts treated as if the debts never existed. (Pls.' Resp. at 3.)

To establish a violation of § 525(a), plaintiffs must show that 1) defendant is a governmental unit, 2) defendant engaged in conduct prohibited by § 525(a), and 3) defendant

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(j) Notwithstanding the provisions of paragraph (g) of this section, the Secretary may exclude the amount of guaranty or insurance entitlement used for any guaranteed or insured loan provided:

(1) The property which served as security for the loan has been disposed of by the veteran, or has been destroyed by fire or other natural hazard; and

(2)(i) The loan has been repaid in full or the Secretary has been released from liability as to the loan, or if the Secretary has suffered a loss on said loan, such loss has been paid in full; ...

(k) The Secretary may, in any case involving circumstances deemed appropriate, waive either or both of the requirements set forth in paragraphs (j)(i) and (j)(2)(i) of this section.

38 C.F.R. § 36.4302.

discriminated against plaintiffs solely because plaintiffs failed to pay a debt that was discharged in bankruptcy.[6] Defendant acknowledges that it is a governmental unit. Defendant denies, however, that its conduct violated § 525(a) and further maintains that its conduct was motivated, not by plaintiffs' failure to pay prepetition debts but rather by the loss the United States sustained on behalf of plaintiffs in previous dealings, as permitted by the statute and regulations governing defendant's loan guaranty program. Because the court concludes that the home loan guaranty is not an "other similar grant" within the meaning of § 525(a), the court need not address the issue of causation.[7]

C. Home Loan Guaranty Entitlement as an "Other Similar Grant" under 525(a)

Section § 525(a), prohibits the government from denying "a license, permit, charter, franchise, or other similar grant to ... a person that.. . has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act...." While the language "other similar grant" clearly indicates that the specifically enumerated items do not, standing alone, comprise an exhaustive list of prohibited areas of discrimination, the use of the word "similar" simultaneously circumscribes the substantive scope of the discrimination that is prohibited by the plain language of the Act.

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[6] Plaintiffs characterize this third prong of the test as the causation clement. Plaintiffs argue that defendant refused to reinstate in full their home loan guaranty entitlements solely because the plaintiffs did not repay discharged debts, and they timber maintain that defendant has failed to point to any issue of material fact on this issue. (Pls.' Reply at 5.)

[7] Plaintiffs have argued that Federal Communications Commission v. Nextwave Personal Communications, Inc., 537 U.S. 293 (2003), is of great importance to § 525 jurisprudence and to this case in particular, (Pls.' Resp. at 11). White Nextwave may be pertinent to the resolution of the causation issue, which this court need not address, there was no question in Nextwave that a governmental unit had revoked a "license," a specifically enumerated item in die text of § 525(a). Thus, Nextwave is not particularly instructive in the interpretation of the phrase "other similar grant."

To discern whether the VA has discriminated against plaintiffs within the meaning of this Act, the court must determine whether a home loan guaranty is a grant similar to a license, permit, charter or franchise.

In Watts v. Pennsylvania Housing Finance Co., 876 F.2d 1090, 1093 (3rd Cir. 1989), the Third Circuit opined that "the items enumerated [in § 525(a)] are in the nature of indicia of authority from a governmental unit to the authorized person to pursue some endeavor. Thus, a 'similar grant' should be given the same meaning."[8] Concluding that a loan extended by Pennsylvania's Homeowner's Emergency Mortgage Assistance Program (HEMAP) to prevent imminent mortgage foreclosure was not a "similar grant," the Watts court relied on the Second Circuit's recognition in Goldrich v. New York State Higher Education Services Corp., 771 F.2d 28, 30 (2nd Cir. 1985), that a "credit guarantee" was not a "similar grant." Id. (citing Goldrich 771 F.2d at 30 ("Although the exact scope of the items enumerated may be undefined, the fact that the list is composed solely of benefits conferred by the state that are

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[8] In a recent decision, the bankruptcy court in Maine cited Collier's elaboration on the protections of § 525(a):

> Thus, [b]eyond the area of driver"s licenses, debtors are protected from denial of continued occupancy in public housing based upon dischargeable debts for past rent, from denial of student transcripts based upon dischargeable tuition or student loan debts, from denial of participation as providers in the Medicaid or Medicare Program and from the denial of a contractor's license, a real estate license, a liquor license, a license to practice law, an insurance agent license and a casino license, if any such denial is based solely upon past or present nonpayment of a dischargeable debt. Similarly, a governmental unit cannot condition the granting of other privileges, such as the approval of permits, zoning or land use changes, upon payment of discharged debts. Collier, 525.02[2] (citations omitted).

In re Jasper, 325 B.R. 50, 54 (Bankr. D. Me. 2005).

unrelated to credit is unambiguous.").) See also Toth v. Michigan State Housing Development Authority, 136 F.3d 477, 480 (6th Cir.) ("target of § 525(a) is government's role as a gatekeeper in determining who may pursue certain livelihoods"), cert. denied, 524 U.S. 954 (1998).[9]

Plaintiffs are clearly correct that the Goldrich court's specific holding that the denial of student loan guaranties did not constitute actionable discrimination under § 525 was later abrogated by Congress's decision to amend § 525 by adding § 525(c), specifically pertaining to student loans, in the Bankruptcy Reform Act of 1994.[10] Plaintiffs are also

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[9] But see Matter of Rose, 23 B.R. 662, 666-67 (Bankr. D. Conn. 1982) (relying on other courts' decisions that government contracts, public housing, liquor licenses, college transcripts, and student loans come within the purview of § 525(a) and She legislative history of the statute to conclude that § 525(a) also applies to mortgage financing offered by a state government).

[10] Section 525(c) provides:

> (c)(l) A governmental unit that operates a student grant or loan program and a person engaged in a business that includes the making of loans guaranteed or insured under a student loan program may not deny a grant, loan, loan guaranty, or loan insurance to a person that is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, or another person with whom the debtor or bankrupt has been associated, because the debtor or bankrupt is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of a case under this title or during the pendency of the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.
>
> (2) In this section, "student loan program" means the program operated under part B, D, or E of title IV of the Higher Education Act of 1965 or a similar program operated under State or local law.

correct that the Watts court relied on Goldrich's reasoning prior to that abrogation.[11] Congress's decision to amend section 525 by adding § 525(c) does not necessarily alter the essential correctness of the analysis of the plain language of § 525(a) offered by the Second and Third Circuits in Goldrich and Watts. Indeed, that analysis has been adopted or noted with approval by other courts, including the Fourth Circuit, since the 1994 amendment of section 525. In 1998, the Sixth Circuit opined that

> [t]he items enumerated in [§ 525(a)] – licenses, permits, charters, and franchises -are benefits conferred by government that are unrelated to the extension of credit. They reveal that the target of § 525(a) is government's role as a gatekeeper in determining who may pursue certain livelihoods. It is directed at governmental entities that might be inclined to discriminate against former bankruptcy debtors in a manner that frustrates the "fresh start" policy of the Bankruptcy Code, by denying them permission to pursue certain occupations or endeavors. The intent of Congress incorporated into the plain language of § 525(a) should not be transformed by employing an expansive understanding of the "fresh start" policy to insulate a debtor from all adverse consequences of a bankruptcy filing or discharge.

Plaintiffs assert that this amendment was made in response to Goldrich which held that section § 525(a) did not apply to extensions of credit or loan guaranties.

[11] See also In re Cleasby, 139 B.R. 897, 899-901 (W.D. Wis. 1992), and Lee v. Yeutter, 106 B,R. 588, 592 (D. Minn. 1989), aff'd 917 F.2d 1104 (8th Cir. 1990), two other pre-1994 cases relying on Goldrich reasoning.

Toth, 136 F.3d at 480 (holding that extensions of credit do not come within the reach of § 525(a)). See also In re Bryant No. 96-1161, 1997 WL 633256 (4th Cir. Oct. 14, 1997) (relying explicitly on Goldrich and In re Cleasby, 139 B.R. 897, 899-901 (W.D. Wis. 1992); "because the determination of whether to extend credit is not an application for a "license, permit, charter, franchise, or other similar grant," the [Farmers' Home Administration's] consideration of the Bryants' ability to repay the loan for which they had applied and their past credit history docs not implicate 11 U.S.C.A. § 525(a)); Bentley v. Glickman, 234 B.R. 12, 20 (N.D.N.Y. 1999) (relying on Goldrich's conclusions that "a loan or other form of credit guarantee was not 'a license, permit, charter, franchise, or other similar grant' and that § 525 did not therefore provide protection against consideration of debtor status in credit arrangements" and noting that "[a]lthough § 525 was amended in the interim between Goldrich and the present action, § 525(a) remains the same in all material respects."); Baumgartner v. United States Dep't of Agriculture, No. 2:97-CV-34, 1998 WL 278255 (W.D. Mich. Feb. 17, 1998) (relying on Toth to hold that denial of loan application was not discriminatory violation of § 525(a)); In re Jasper, 325 B.R. 50, 53 (Bankr. D. Me. 2005) (holding that federal credit union's extension of credit union privileges, including check cashing privileges, ATM transactions, and online banking, is not "a license, permit, charter, franchise or other similar grant). Compare In re Exquisito Services, Inc., 823 F.2d 151, 154 (5th Cir. 1987) (the § 8(a) program, pursuant to which the SBA contracted with the Air Force to provide services and under which the SBA subsequently determined that the debtor would have the exclusive right to perform those services according to the terms and for the length of that contract with assistance from the SBA, is "essentially a franchise as defined in Black's Law Dictionary and, as such, is included within the scope of 11 U.S.C. § 525(a)); In re General Development Corp., 163 B.R. 216, 220 (S.D. Fla. 1994) (finding the approval of a

platting or replatting action most analogous to cases dealing with the granting of liquor or business licenses and thus within the purview of "other similar grants" under § 525(a)).

Aside from the fact that courts have continued to rely on Goldrich's reasoning after the amendment of § 525, the narrow manner in which Congress chose to amend § 525 also persuades this court that § 525(a) does not and should not apply to extensions of credit or home loan guaranties offered by the federal government. In other words, if interested in abrogating the reasoning of Goldrich, as opposed to its outcome, Congress could have amended § 525(a) itself to prohibit discrimination based on the extension of credit, loans or loan guaranties. Congress may also have chosen to write § 525(c) more broadly, extending that provision to any loan or guaranty offered by the government, as opposed to limiting that section to student loan programs. The court is reluctant to construe § 525(a) in a broader manner than its plain language would appear to support.

In a further attempt to discredit the reasoning relied upon in Goldrich,[12] plaintiffs offer In re Stoltz, 315 F.3d 80, 86 n.2 (2nd Cir. 2002), as an example of a case in which the Second Circuit criticized its own reasoning in Goldrich. (Pls.' Resp. at 14.) The holding in Stoltz, however, ultimately rested on that court's conclusion that a public housing lease was a "grant" similar in nature to the

[12] In yet another argument, plaintiffs contend that the Second Circuit's holding in Goldrich that a "credit guaranty" is not "similar to a "license, permit, charter or franchise" was "overturned by statute." (Pls.' Resp. at 14.) "If the statutory amendment left any questions," plaintiffs continue, "Nextwave clearly abrogated Goldrich." (Id.) As noted previously, however. Nextwave involved an actual license extended by the FCC and thus the Nextwave decision is not relevant to the cited portion of the Goldrich decision nor is it relevant to this court's consideration of whether a home loan guaranty is similar to a license or franchise or other specifically enumerated item in § 525(a).

enumerated items in § 525(a), i.e., a "property interest[]... unobtainable from the private sector and essential to a debtor's fresh start." Id. at 90.[13] The Stoltz court specifically noted that the withholding of a real estate license, a state university transcript, or a driver's license, each unobtainable from the private sector, would jeopardize a debtor's ability to practice a chosen profession, apply for work or further schooling, or commute to work or school, respectively, and would thus impede a debtor's ability to obtain the fresh start intended by the code. Id. Likewise, the court explained, the revocation of a public housing lease, resulting in the eviction of a debtor-tenant, would be likely to cause homelessness, "a status not conducive to economic survival" and necessarily inimical to the fresh start envisioned by the bankruptcy code. Id. The guaranty of a home loan is simply not a "grant" in the way a public housing lease may be considered a grant, i.e., a "transfer of property by deed or writing," Id. at 89, nor is it a "a property interest[]... unobtainable from the private sector and essential to a debtor's fresh start," Id. at 90. Owning one's own home, while desirable and possibly preferable from an investment standpoint, is simply not essential to a "fresh start" in the way that the basic need for shelter and avoidance of homelessness discussed in Stoltz is essential to a "fresh start." Accepting the reasoning of the Stoltz opinion merely for the sake of argument, this court must conclude that its reasoning is not dispositive of the case before it based simply on the dissimilarity between a public housing lease, as described by that court, and the type of home loan guaranty at issue here.

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[13] Compare In re Jasper, 325 B.R, at 55 (because check cashing privileges, ATM transactions, online banking, minimum account balances, and the like are widely available, federal credit union's revocation of those privileges based on loss occasioned by plaintiffs docs not impair plaintiffs' fresh start despite the possibility that plaintiffs may pay slightly more for banking services as a result: "it should come as no surprise that bankruptcy can bring on some adverse consequences").

Plaintiffs further encourage this court to rely on the legislative history of § 525 to construe that section broadly to prohibit discrimination based on debts discharged in bankruptcy. This court cannot, however, ignore or pass over the plain language of a statute and reach for the legislative history in order to accord that language broader meaning than the language itself supports. See U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 235, 242-43 (1989) ("The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" (citing Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)); In re Stoltz, 315 F.3d at 89 ("[W]e begin [statutory interpretation] with the understanding that Congress says in a statute what it means and means in a statute what it says." (citing Hartford Underwriters Ins. Co. v. Union Planters Bank, 530 U.S. 1, 6... (2000)); In re Exquisito Services Inc., 823 F.2d at 153 (acknowledging that some courts have relied on legislative history of § 525 to construe the statute broadly but recognizing that "[t]he better approach is taken by other courts that have focused on the specific language of the section, and have read the legislative history more narrowly. Those following this approach tend to limit the application of § 525 only to situations analogous to those enumerated in the statute."); B.N. Realty Assoc. v. Lichtenstein, 238 B.R. 249, 254 (S.D.N.Y. 1999) ("There is little question that the 'plain meaning rule' governs interpretation of the Bankruptcy Code. '[T]he Supreme Court has consistently decided bankruptcy cases following a textualist approach for statutory interpretation, more commonly known as the plain meaning rule[,]... which presumes the intent of Congress is captured in the language of the statute and that the sole function of the courts is to enforce it according to its terms.'" (citation omitted)).

Plaintiffs suggest that extensions of credit are distinguishable from guaranties of loans and that Toth, Watts and Cleasby are thus inapposite. Plaintiffs assert that defendant is not providing home loan guaranties based on the creditworthiness of the veteran applicants in this context, and that cases pertaining to the extension of credit and associated analyses of creditworthiness are irrelevant. While creditworthiness does not appear to be "irrelevant" under the statutory scheme, see n.4 *supra,* it does not appear to have been a factor in the decisions made by the VA in the cases before the court. However, from an analytical perspective, the extension of a home loan guaranty has financial consequences for the guarantor that are not dissimilar to consequences often faced by those who extend credit. Guaranteeing a loan and extending credit are more similar to each other analytically than either of those are to the extension or issuance of a franchise, license, or permit. Thus, the reasoning in Toth and Watts is applicable here.

Because the court agrees with defendant that the plain language of section § 525(a) as well as a reading of section § 525 in its entirety indicate that a home loan guaranty is not an "other similar grant" within the meaning of the statute, the court concludes that plaintiffs have failed to state claims upon which relief can be granted.

Conclusion

For the foregoing reasons, plaintiffs' motion for partial summary judgment is DENIED, defendant's motion to dismiss is ALLOWED, and this case is DISMISSED.

This 5 October 2005.

/s/
W. Earl Britt
Senior United States District Judge